DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	
PLAINTIFFS: Anthony Lobato, *et al.* **and** **PLAINTIFFS-INTERVENORS:** Armandina Ortega, *et al.* **v.** **DEFENDANTS:** The State of Colorado, *et al*.	▲ **COURT USE ONLY** ▲
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DEFENDANTS' TRIAL BRIEF	

Education is of paramount importance to the State of Colorado, as it is critical to developing a strong economy and increasing the quality of life of all residents. To this end, Colorado is a national leader in education reform efforts. Each year, the General Assembly spends countless hours developing education policy and the public school funding system. The General Assembly annually invests billions of dollars into public primary and secondary education. It now picks up nearly two-thirds of the cost of public schooling even as the local share—the portion of costs paid by school districts—has dropped from nearly 60 percent two decades ago to about 35 percent today.

Unsatisfied with the General Assembly's fiscal and policy decisions and the state's substantial and increasing investment of time and money into public education, Plaintiffs and Plaintiff-Intervenors have brought suit contending the public school finance system is constitutionally irrational. As a result, Plaintiffs and Plaintiff-Intervenors allege, Colorado school children are not receiving a "thorough and uniform" education, Colo. Const. art. IX, sec. 2, and school districts in Colorado lack local "control over instruction," Colo. Const. art. IX, sec. 15. The underlying premise of their case is that, with more money, student achievement will increase. While perhaps facially appealing, as all parties agree that improving the quality of educational opportunities of the state's young people is of vital importance, these claims fail upon closer examination.

Plaintiffs and Plaintiff-Intervenors repeatedly contend the public school finance system cannot be rational because the state has not studied the cost of the various pieces of "education reform legislation" passed over the last few decades. As an initial matter, the constitution has never, and does not now require 100 percent state funding of aspirational legislation. While it is

true the state has not conducted the "cost study" Plaintiffs demand, such is legally irrelevant. Rational basis review is a minimally-intrusive form of judicial review which requires a court to defer to the legislature's fiscal and policy decisions. Each year, the General Assembly reviews the public school finance system. Just because it has not studied the system in the manner envisioned by Plaintiffs and Plaintiff-Intervenors does not mean the system is constitutionally irrational.

At the end of the day, however, this Court need not decide what, precisely, the Constitution's clauses concerning a thorough and uniform system of education and local control over instruction mean, or whether the General Assembly has conducted the right kind of study. This is because the fundamental premise of Plaintiffs and Plaintiff-Intervenors' cases—that student performance will improve with additional funds, thereby curing the system's purported unconstitutionality—is questionable at best. As both courts and education experts recognize, after years of court-ordered funding decisions and little, if any, discernible increase in student outcomes, there is a growing consensus that increased spending alone does not lead to increased student outcomes; it is not how *much* money is spent that matters but *how* the money is spent. Indeed, this lawsuit is one in a long line of state educational "adequacy" cases, and the result of this national experiment is tragic. As you will hear from witnesses including Dr. Eric Hanushek of Stanford University, court-ordered increases in funding have not led to real-world increases in achievement. Consequently, it is not constitutionally irrational for the General Assembly to decline to appropriate the billions of additional dollars Plaintiffs and Plaintiff Intervenors claim is necessary.

In short, the question before this Court is a narrow one: are the fiscal and policy decisions made during the 17 sessions of the General Assembly since 1994 irrational? Given the countless hours the General Assembly spends studying and debating school finance each year, the numerous school finance studies, the two interim committees on school finance, and the billions of dollars annually appropriated to the school finance system, as well as the growing consensus that more money alone will not lead to improved student outcomes, Defendants submit the answer to that question is no.[1]

I. The Education And Local Control Clauses Do Not Turn Every Goal, Aspiration, Or Education Reform Effort Into A Financial Entitlement.

135 years ago, 39 men gathered in Denver and drafted the Colorado Constitution. *Proceedings of the Constitutional Convention for the State of Colorado 1875–1876* at 15–17 (Smith Brooks Press 1907). They charged the General Assembly with "the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously." Colo. Const. art. IX, sec. 2. "The general supervision of the schools of the state" was vested in a state "a board of education," Colo. Const. art. IX, sec. 1, but local "school districts of convenient size" as provided by the general assembly "shall have control of instruction," Colo. Const. art. IX, sec. 15. Plaintiffs envision these provisions to require billions

[1] In various motions filed throughout the course of this case, Defendants have outlined their position on a variety of legal issues, such as that Plaintiffs and Plaintiff-Intervenors must prove their case beyond a reasonable doubt, that the Constitution contemplates the state's ability to impose unfunded mandates on school districts, and that the analysis of whether the General Assembly's education funding decisions were irrational cannot be conducted in a vacuum, but rather must be evaluated in light of other important state services and the Constitutional restrictions on the State's budget. Defendants respect and abide by the Court's orders on these issues, but make clear that they preserve their arguments and objections to these rulings for appeal.

of dollars in annual appropriation because the legislature has decided to hold districts accountable for the performance of their students under modern digital-age standards. While the Supreme Court instructed that this Court "*may* appropriately rely on the legislature's own pronouncements," *Lobato v. State*, 218 P.3d 358, 375 (Colo. 2009) (emphasis added), the education reform statutes at issue in this case do not change the original intent and continuing force of the Education and Local Control Clauses.

Nothing in Colorado's Constitution requires particular educational programs or outcomes. Aware of other state constitutions' use of the words "thorough" and "uniform," *see People v. Rodriguez*, 112 P.3d 693, 699–700 (Colo. 2005) (citing authority and discussing constitutional construction), Colorado's drafters were the first to employ both, (Pls.' Expert Discl., Ex. C [Romero Report], at 4 n.21). In the late 1800s, a "thorough" system of schools was commonly understood to refer to both primary and secondary levels of education. *See* John Dinan, *The Meaning of State Constitutional Education Clauses: Evidence From the Constitutional Convention Debates*, 70 ALB. L. REV. 927, 951 (2007) (contrasting term "common," which "were understood to be limited to basic elementary instruction"), *accord* Noah Webster, *An American Dictionary of the English Language* (Merriam 1859) (defining "thorough" as, in part, "[l]iterally, passing through or to the end" and "complete"); *Proceedings*, *supra*, at 43 (rejecting resolution calling for limited system of "good common schools"). Under its most expansive contemporary usage, "uniform" required the same levels of schooling throughout a state, while a narrower view contemplated a comparable schedule of operation statewide. *See* Dinan, *supra*, at 961–64, *accord* Webster, *supra* (defining "uniform" as, in part, "[o]f the same form with others" and "conforming to one rule or mode").

Nor does the Colorado Constitution require a specific level of state education funding. When constitutional drafters were concerned about minimum funding levels for education, they included specific provisions, such as in the Missouri Constitution of 1875, article IX, section 3(b), which requires that no "less than twenty-five percent of the state revenue" must "be applied annually to the support of the free public schools," or the Pennsylvania Constitution of 1874, article X, section 1, which requires an annual appropriation of "at least one million dollars." Although well aware of these constitutions, *Rodriguez*, at 112 P.3d at 699–700, Colorado's drafters did not proscribe any minimum funding level. In accordance with Congress's Enabling Act, Romero Report at 2 n.7, the drafters identified a "public school fund of the state" to provide interest income to be "expended in the maintenance of the schools of the state," which "shall be distributed amongst the several counties and school districts of the state, in such manner as prescribed by law," Colo. Const. art. IX, sec. 3. Yet, this fund, based on federal land grants, was never intended to be the sole means of funding the state public school system. From the time of drafting in the late 1800s to 1939, local property taxes made up over 95 percent of the revenues for schools. (Defs.' Ans. Br. to Colo. App., *Lobato v. State*, at 26 (citing *Revenues for Colorado Public Schools 1877–1979,* at R. pp. 184–87; *General Laws of the State of Colorado,* 1877, §§ 63, 66).) *See also Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1011 (Colo. 1982) (noting state support was initially limited only to revenue from interest, rentals, and leases on state-owned lands). The share of state funds gradually grew, but even as recently as 1979, 54 percent of all school funds were locally raised. (Defs.' Ans. Br. to Colo. Ct. App., *Lobato v. State*, at 26 (citing *Revenues*, *supra*, at R. pp. 184–87).) The voters have since adopted Amendment 23, Colo.

Const. art. IX, section 17, but this addition would have been superfluous if the Education or Local Control Clauses require any greater level of funding.

According to the drafters of the Colorado Constitution, and confirmed by this Court, *see* Court Order, July 14 at 2-3, it is the "*system* of free public education" that must be thorough and uniform. Art. IX, sec. 2 (emphasis added). Individuals aged six to 21 years are guaranteed a gratuitous education—not any fundamental right. *Lujan*, 649 P.2d at 1017. When the framers intended to guarantee individual rights, they did so in clear terms. Colo. Const. art. II, sec. 3 ("All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness."). Education clauses like Colorado's "were not drafted for the purpose of enabling judicial scrutiny of legislative judgments regarding school financing." Dinan, *supra*, at 947. Instead, the drafters wanted to "establish[ ] a state school system, specify[ ] the level of schooling to be supported by the state, ensur[e] that such schools were free of charge to attending students, provid[e] that all local districts would operate schools and for a certain period of time each year, and clarify[ ] the relationship between the state and the local districts." *Id.*

While the state board is charged with "general supervision," local "control over instruction" means school districts are responsible for the actual delivery of education. Colo. Const. art. IX, sec. 15; *see Lujan*, 649 P.2d at 1022–23, 1025; *Bd. of Educ. of Sch. Dist. No. 1 v. Booth*, 984 P.2d 639, 648 (Colo. 1999). As this Court recently explained,

> [t]he framer's desire for local school districts to retain control of "local instruction" stemmed from the widely held notion that decisions regarding local education "should reflect the value system and education emphasis of those children being taught,"

> *Cary v. Bd. of Educ.*, 598 F.2d 535, 543 (10th Cir. 1979), and thus that choices regarding local education programs and policies should be left to local decision makers. *See Lujan* [ ], 649 P.2d [at] 1021 [ ]. Accordingly, when determining which areas of education policy local school districts must retain exclusive control over, both the legislature and the courts have generally limited their holdings to only those areas which uniquely affect *instruction*. Such areas include curriculum choices, § 22-32-109(1)(t), C.R.S. (2010), textbook choices, Colo. Const. art. IX, § 16, hiring and firing of teachers, *Big Sandy Sch. Dist. No. 100-J v. Carroll*, 433 P.2d 325, 328 (Colo. 1967), and instruction paid for with locally raised funds, *Owens v. Colo. Cong. of Parents, Teachers, and Students*, 92 P.3d 933, 935 (Colo. 2004).

Adams 12 Five Star School v. Colo. State Bd. of Educ., No. 2011CV1910, Court Order (re: Defendant's Motion to Dismiss), July 13, 2011 (emphasis in original).

The voters' and their elected officials' understanding of thorough and uniform and general supervision has no doubt changed since the legislature's initial session in 1877. The Colorado Supreme Court declared in 1982 that "the General Assembly [must] provide to each school age child the *opportunity* to receive a free education." *Lujan*, 649 P.2d at 1018–19 (emphasis added). Even if the legislature and state board currently endorse standardized test scores on modern core standards as a means of measuring the provision of educational opportunities, it is within the maintenance and general supervision of the public education system to do so. Nothing in the constitution requires that these exercises of authority, which do not uniquely affect instruction, be combined with a new fiscal appropriation. The constitution certainly does not require state funding of *federal* legislation, such as No Child Left Behind.

School districts may not use the Education and Local Control clauses to transform statutory requirements into constitutional entitlements to full state funding. Just as local school districts bear responsibility for the provision of opportunities through instruction of their

students, they have always borne a share of funding. If education reform legislation had to be accompanied by whatever funding may be required, then the constitution would be frustrated, as such statutes likely would never have been enacted. The state ought not be punished for its aspirational goals.

II. The General Assembly's Fiscal And Policy Decisions Developing the Public School Finance System and Its Allocation of Billions Of Dollars to Public Education Are Not Irrational Ways Of Satisfying These Constitutional Provisions.

As the Supreme Court admonished, this case is "not to determine 'whether a better finance system could be devised.'" *Lobato*, 218 P.3d at 363 (quoting *Lujan*, 649 P.2d at 1025). Rather, it is about whether Plaintiffs and Plaintiff-Intervenors can prove the public school finance system developed, debated, and revised by the General Assembly is not rationally related to the constitutional mandate that it provide a "thorough and uniform system free public schools," Colo. Const. art. IX, sec. 2, and the constitutional protection of local "control over instruction," Colo. Const. art. IX, sec. 15. *See generally Lobato*, 218 P.3d at 363, 374. Whether on the law or the facts, they cannot meet this burden.

Rational basis, as the Supreme Court explained in this case, is a "minimally-intrusive" standard of review. *Id.* at 373. This Court must give "substantial deference to the legislature's fiscal and policy judgments." *Id.* at 363. This is because under rational basis review, "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Indeed, under well established rational basis review, a party challenging the State's actions "cannot prevail so long as 'it is evident from all the considerations presented to [the legislature], and those of which [the court] may take judicial notice, that the question is at least debatable.'" *Minnesota v. Clover*

Leaf Creamery Co., 449 U.S. 456, 464 (1981) (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938)). Consequently, this "court's task is not to determine 'whether a better system could be devised,' but rather to determine whether the system passes constitutional muster." *Lobato*, 218 P.3d at 374 (quoting *Lujan*, 649 P.2d at 1025).

A look at the facts, particularly through this deferential lens, demonstrates that Plaintiffs and Plaintiff-Intervenors cannot meet their burden. As a threshold matter, the General Assembly, in passing the 1994 Public School Finance Act, expressly stated

> this article is enacted in furtherance of the general assembly's duty under section 2 of article IX of the state constitution to provide for a thorough and uniform system of public schools throughout the state.

§ 22-54-102(1), C.R.S. (2010). In other words, the legislature has told us why it enacted the public school financing system, and that is to perform its constitutional duty. This pronouncement is strong, if not dispositive, evidence of at minimum a rational connection between the system and the constitution. *Barket, Levy & Fine, Inc. v. St. Louis Thermal Energy Corp.*, 21 F.3d 237, 240 (8th Cir. 1994) ("Under rational basis review, we accept 'at face value contemporaneous declarations of the [governmental] purposes … unless 'an examination of the circumstances forces [us] to conclude that they could not have been a goal of the [classification].'") (quoting *Hancock Indus. v. Schaeffer*, 811 F.2d 225, 237 (3d Cir.1987)); *see also People v. Strean*, 74 P.3d 387, 394 (Colo. App. 2002) (looking to statute's legislative declaration in conducting rational basis analysis); *Torres v. Portillos*, 638 P.2d 274, 277 (Colo. 1981) (same).

Even assuming something more is needed, a review of the substantial dollars the state provides to public education further demonstrates the funding system is not an irrational one.

Since the passage of the most recent Public School Finance Act in 1994, the General Assembly each year has allocated 40 percent or more of Colorado's General Fund budget to K–12 education. (*See* Defs.' Trial Exs. 30120-30135.) Colorado's financial support for public education has grown dramatically during that time, from approximately $1.5 billion General Fund dollars and $1.7 billion total dollars in 1994–95 (Defs.' Trial Ex. 30120 p. 19) to more than $3 billion General Fund dollars and nearly $4.4 billion total dollars in 2010–11 (Defs.' Trial Ex. 30135 p. 14).

Not only has the state more than doubled its investment in public education since 1994, it now picks up the lion's share of the total cost of public schools, even though public schools in Colorado were traditionally funded primarily at the local rather than the state level. Over just the last two decades, the local and state shares of the cost of public schools have flipped, from nearly 60 percent local funding in 1987-88 to nearly 65 percent state funding in 2011–12. (Defs.' Trial Ex. 30038, p. 9.) *See also Lobato*, 218 P.3d at 374 n.20 (noting shift). Moreover, even though the Public School Finance Act gives Colorado's 178 school districts the power to go to their local voters and raise additional monies for the local public schools (*see* Defs.' Tr. Ex. 30114, p. 18–21), the evidence will show that many districts, particularly those bringing this lawsuit, have not done so. The local school districts' failure to fulfill their historic and constitutional responsibility to fund their schools underscores the significant and growing effort the State makes to support public education.

In addition to the billions of dollars invested in public schools, the way those funds are distributed demonstrates that the connection between the public school funding system and the relevant constitutional mandates is not an irrational one. Among other things, the system:

- adjusts for the cost of living in each of the State's 178 school districts;
- adjusts for the size of the districts to recognize purchasing power differences;
- provides additional funding for the "at-risk" pupil population;
- provides additional funding for students in the smallest, most remote schools;
- provides additional funding for non-native English speakers;
- provides additional funding for gifted & talented students;
- provides additional funding for students with disabilities;
- provides additional funding to defray transportation costs;
- provides additional funding to pay for high quality preschool for students with particular risk factors; and
- provides a generous grant program to help schools construct and repair school buildings.

(*See, e.g.*, Defs.' Trial Ex. 30012.) Thus, the public school finance system is not a blunt instrument, but rather a nuanced mechanism for rationally distributing dollars in accordance with the Education and Local Control Clauses.

Despite the billions of dollars invested through this comprehensive system, Plaintiffs and Plaintiff-Intervenors nonetheless contend the system does not pass minimal constitutional muster. Their argument seems to be that the public school finance system is unconstitutional unless the General Assembly undertakes a study of each and every piece of so-called education reform legislation to determine the costs of fully effectuating those statutes. (*See, e.g.*, Pls. 3d Am. Compl. ¶ 88; Pl.-Intervs.' Am. Compl. ¶ 87.) If this were the rule, no trial would be necessary, as Defendants do not dispute such a study has not been done. However, Defendants

are unaware of any case holding the legislature must take one and only one specific action to survive rational basis. Indeed, such a rule would be antithetical to the rational basis test and more akin to the strict scrutiny reserved for fundamental rights. *See, e.g.*, *Beach Communication, Inc.*, 508 U.S. at 315 ("[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."). Even if Plaintiffs' proposed "cost study" could be one way to meet the rational basis test, it is by no means the only way.

More importantly, while the state has not conducted the "cost study" that Plaintiffs and Plaintiff-Intervenors would require, the state has repeatedly studied the public school finance system. For example:

- There were several studies leading up to the enactment of the Public School Finance Act of 1994, including a 1990 study by the General Assembly's Commission on School Finance (Defs.' Tr. Ex. 30104), two studies in 1993 examining the structure of the then-existing Public School Finance Act of 1988 (Defs.' Tr. Exs. 30109–11), and a comprehensive study by the General Assembly's 1993 Interim Committee on School Finance, which was charged with "conducting a complete and thorough examination of the current school finance act and suggesting changes and improvements to the state's public school financing system." (Defs.' Tr. Ex. 30105, p. 1.)
- The 1994 Public School Finance Act itself directed the General Assembly to study a variety of school finance issues, including "those factors that significantly increase the cost of educational services," "the circumstances that contribute to a student becoming at

risk," and "the ability of rural and urban public schools to meet their capital demands within the constraints of current laws and regulations." (Defs.' Tr. Ex. 30112, p. 1.)

- Since 1993, every two years the General Assembly has conducted a cost of living study in order to update the cost-of-living factors in the public school funding formula. (Defs.' Tr. Exs. 30100, 30150, 30153, 30156, 30159, 30162, 30165.)
- In 1996, the General Assembly's Committee on K–12 Capital Construction Finance conducted a study of "issues related to public school capital construction, including strategies and revenue sources for financing such construction." (Defs.' Tr. Ex. 30102, p. xi.)
- In 2000, the General Assembly studied the definition of "at risk" pupils as used in the Public School Finance Act of 1994. (Defs.' Tr. Ex. 30101.)
- In 2005, the General Assembly formed an Interim Committee on School Finance, charged with "studying the funding for students in public schools statewide, analyzing the needs of public school facilities throughout the state, and determining funding factors and formulas that should be adopted to ensure that all students in public schools in the state are receiving a thorough and uniform education in a safe and effective learning environment." (Defs.' Tr. Ex. 30106, p. xi.)
- In 2009, the General Assembly, through another Interim Committee to Study School Finance, again studied "appropriate funding factors, formulas, and the allocation of resources to ensure that all students in public schools are receiving a thorough and uniform education." (Defs.' Tr. Ex. 30108, p. 1.)

As various witnesses will testify, the General Assembly has made changes as a result of many of these studies and commissions as it works to refine the public school finance system. In other words, the General Assembly has exercised its fiscal and policy judgment to establish a public school finance system—expressly in furtherance of the constitutional mandate at issue in this case—and has studied it, modified it, and significantly increased the amount of money devoted to it. Such a system is the very embodiment of a rational one.

III. Plaintiffs' and Plaintiff-Intervenors' Premise That More Money Will Increase Student Achievement Is Debatable, And Therefore The General Assembly's Funding Decisions Are Rational.

According to the Plaintiffs and Plaintiff-Intervenors, this case is a simple one: the public school finance system is unconstitutional because funding levels are inadequate. Yet, this argument mistakenly assumes current achievement levels are caused by inadequate funding and more money will lead to better student outcomes. All parties agree that improving the quality of educational opportunities of the state's young people is of vital importance. Where the parties disagree is how to achieve these laudable goals and who bears the responsibility for achieving them. Plaintiffs would reduce these complex questions to simply an issue of more money.

Plaintiffs and Plaintiff-Intervenors' assertion that more money is necessary to achieve better student outcomes, while perhaps appealing on its face, suffers from numerous flaws. Decades ago, both the Colorado and United States Supreme Courts recognized there was a "fundamental disagreement … concerning the extent to which there is a demonstrable correlation between educational expenditures and the quality of education." *Lujan*, 649 P.2d at 1018 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 43 (1973)). Today, that "fundamental disagreement" has evolved into a "growing consensus in education research that funding alone

does not improve student achievement." *Horne v. Flores*, 129 S.Ct. 2579, 2603–04 n.17 (2009) (citing, *inter alia*, Eric A. Hanushek, The Failure of Input-Based Schooling Policies, 113 ECONOMIC J. F64, F69); *see also Abbott ex. Rel. Abbott v. Burke*, 20 A.3d 1018, 1097 (N.J. 2011) ("[T]his court agrees with Dr. Hanushek how money is spent is much more important than how much money is spent.").

Indeed as one court has held, "the admirable quest to create high-performing schools and students *is not a matter of funding alone*." *Cranston Sch. Comm. v. City of Cranston*, 2004 WL 603408, at *5 (R.I. Super. 2004) (unpublished) (emphasis added). The court explained,

> [t]he central issue in all policy discussions is usually not whether to spend more or less on school resources but how to get the most out of marginal expenditures. Nobody would advocate zero spending on schooling, as nobody would argue for infinite spending on schooling. The issue is getting productive uses from current and added spending. The existing evidence simply indicates that the typical school system today does not use resources well (at least if promoting student achievement is their purpose).

Id. (citing, Eric A. Hanushek, "School Resources and Student Performance," *in* DOES MONEY MATTER? at 69 (Gary Burtless ed., Brooking Inst. Press 1996)).

Plaintiffs and Plaintiff-Intervenors' money premise further fails because it ignores the complexity of issues underlying the delivery of education to the young people of our state. If this Court accepts Plaintiffs and Plaintiff-Intervenors' flawed premise, it need not ponder why districts within the state or schools within districts with similar student demographics, property wealth, and education funding levels have very different student outcomes. Throughout Colorado's 178 school districts, there is a wide disparity of achievement that is not related to expenditures. To accept Plaintiffs and Plaintiff-Intervenors' premise would be to ignore the

achievement data in Colorado as well as the failed effort to boost achievement with increased funding across the country. The Court then need not wonder how, in a state like Colorado where local districts have autonomy over their general fund budgets and the state has no authority to monitor or dictate how districts spend their general fund dollars, any additional money allocated to school districts actually will be used to improve student achievement.

Accepting Plaintiffs' and Plaintiff-Intervenors' money premise also ignores local control and how the state's 178 school districts translate this constitutional provision in 178 different ways with regard to decisions around allocation of resources, instructional practices, curriculum selection, hiring and firing of personnel, and collective bargaining. *See, e.g.*, Deposition of Brady Stagner, 16:1-8 ("Local control means that our school board has the ability to say, 'This is an important piece that we need that the neighboring district, that Denver, Colorado, that Colorado Springs doesn't value, doesn't see as important, but it is important to the children of our district,' and I believe that to be local control."); *see also* Deposition of Beverly Maestas, 13:11-16. For example, the Court need not question why, as witness Lori Gillis will testify, the largest district in the state reached an impasse on balancing its budget this year and enlisted the services of a federal arbitrator to negotiate budget cuts with the teachers' union. Nor would the Court need to consider the efficiency of that process and whether decisions were driven by an unqualified desire to increase student achievement. Additionally, acceptance of Plaintiffs and Plaintiff-Intervenors' premise that more money is the answer also avoids consideration of why, as witness Ellen Miller-Brown will testify, one of the wealthiest school districts in the state has one of its most persistent achievement gaps.

Another fundamental problem with Plaintiffs and Plaintiff-Intervenors' money premise is it ignores the evidence that will be presented in this case. Among other witnesses, the Court will hear testimony from Dr. Eric Hanushek, who will explain his research around the lack of any consistent relationship between spending and student outcomes. [2] In particular, he will testify that historical experience with court ordered funding increases has not yielded beneficial results for student achievement. Courts in Wyoming and New Jersey, for example, have ordered aggressive increases in spending that have been ineffective in improving student achievement. Dr. Hanushek also will explain that promoting and maintaining high levels of achievement are very important for Colorado and for the nation, but many popular policies, such as class size reductions, have not proven to be effective in leading to high achievement, are costly, and at best, are extremely inefficient. He will provide testimony that teacher quality is important in improving student outcomes and the General Assembly's enactment of the Educator Effectiveness Bill in 2009, among other education reforms, is a far more effective step in the right direction towards improving student achievement in Colorado.

Moreover, Dr. Hanushek will also testify that "costing-out" studies such as the one produced by Augenblich, Palaich, and Associates are inherently unscientific and unreliable and that they cannot provide a guide to the spending required to meet state standards. While the Augenblich "cost study" purports to present a cost of what additional monies districts require,

[2] It is irrelevant whether the General Assembly in fact considered Dr. Hanushek's analysis when making its public school funding decisions. *HealthONE v. Rodriguez*, 50 P.3d 879, 893 (Colo. 2002) ("If any conceivable set of facts would lead to the conclusion that a classification serves a legitimate purpose, a court must assume those facts exist.") (quoting *Christie v. Coors Transp. Co.*, 933 P.2d 1330, 1333 (Colo. 1997)); *Fed. Communications Comm'n v. Beach Communication, Inc.*, 508 U.S. 307 at 315 (1993) ("[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.").

boiled down, the study is nothing more than a wish list developed by school district employees with a vested interest in the fruits of the study. Further, even if the Court finds more money should be allocated to education, there is no way for the state to ensure how those funds will be allocated once they reach the districts. As already discussed, to do so would run afoul of the districts' constitutional right of local control. *See Cary*, 598 F.2d at 543; *Lujan*, 649 P.2d at 1021.

In any event, rational basis review means this Court need not find Dr. Hanushek is right. It even need not find he is more likely right than any contrary experts Plaintiffs or Plaintiff-Intervenors put forward. Rather, so long as "the question is at least debatable," *Clover Leaf Creamery Co.*, 449 U.S. at 464, this Court must uphold the General Assembly's funding decisions. As both the Colorado Supreme Court and the United States Supreme Court have already confirmed, the question is at the very least a debatable one. For that reason alone, Plaintiffs and Plaintiff-Intervenors' money premise, which lies at the center of their argument that the public school finance system is unconstitutional, cannot stand. *See, e.g.*, *Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199, 1211 (10th Cir. 2009) ("The very fact that this question is so hotly debated … is evidence enough that a rational basis exists."); *cf. Waterman v. Farmer*, 183 F.3d 208, 216 n.8 (3d Cir. 1999) ("[C]ourts are bound to give the legislature greater deference—not less—where the latter has 'undertaken to act in an area' where 'experts disagree.'") (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)).

DATED: July 25, 2011

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **DEFENDANTS' TRIAL BRIEF** upon all parties herein electronically through LexisNexis File & Serve or U.S. Mail this 25th day of July, 2011, addressed as follows:

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